

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Case No.: 2:18-cr-00095-APG-NJK

Plaintiff

Order Denying Motion to Vacate, Set Aside, or Correct Sentence

V.

[ECF No. 262]

EVER ANTONIO ALVARADO-CORONADO,

Defendant

Defendant Ever Antonio Alvarado-Coronado moves under 28 U.S.C. § 2255 to vacate,

10 set aside, or correct his sentence for conspiracy to distribute a controlled substance. ECF No.

11 262. He argues he received ineffective assistance of counsel (Ground 1); his rights under the

12 Fourth, Fifth, and Fourteenth Amendments were violated¹ (Ground 2); his criminal history points
13 were miscalculated (Ground 3); and his conviction lacked supporting evidence (Ground 4). The

14 United States opposes, contending none of the claims has merit and that Alvarado waived

15 Grounds 2, 3, and 4. I deny Alvarado's motion because his ineffective assistance claim is

16 | meritless, and he waived his right to challenge his sentence under any other theory.

BACKGROUND

18 Alvarado pleaded guilty to one count of conspiracy to distribute a controlled substance in

19 violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A)(viii) and was sentenced to 156 months in

20 custody and five years of supervised release. ECF No. 223. Alvarado's plea agreement waived

21 his right to collaterally attack his sentence except for claims of ineffective assistance of counsel.

²⁵ ¹ Ground 2 also alleges Alvarado's Sixth Amendment rights were violated, but this appears to repeat his argument in Ground 1.

1 ECF No. 180 at 11. He appealed to the U.S. Court of Appeals for the Ninth Circuit, but
2 voluntarily dismissed the appeal. ECF Nos. 224, 241. Alvarado now moves under 28 U.S.C.
3 § 2255(a), which permits a prisoner to attack his sentence if it “was imposed in violation of the
4 Constitution or laws of the United States.”

5 **ANALYSIS**

6 **A. Ground 1: Ineffective Assistance of Counsel**

7 Alvarado argues he received ineffective assistance of counsel because his lawyer did not
8 raise “fundamental facts,” including lack of discovery and errors in the calculation of his
9 criminal history points. ECF No. 262 at 4. He also argues his lawyer did not sufficiently
10 advocate for a downward departure from the sentencing guidelines under 18 U.S.C. § 3553. The
11 United States responds counsel exercised sound professional judgment in declining to raise
12 Alvarado’s meritless arguments and was not ineffective where counsel secured a significant
13 downward departure from the guidelines. It also argues Alvarado cannot show he suffered
14 prejudice from any alleged error.

15 To succeed on an ineffective assistance of counsel claim, Alvarado “must prove (1) that
16 his counsel’s performance fell below an objective standard of reasonableness . . . and (2) that
17 there is a reasonable probability of a more favorable outcome if counsel performed effectively.”
18 *Rogers v. Dzurenda*, 25 F.4th 1171, 1181 (9th Cir. 2022). Alvarado “must show that counsel
19 made errors so serious that [he was] not functioning as the counsel guaranteed by the Sixth
20 Amendment.” *Id.* (simplified). There is “a strong presumption that counsel’s conduct falls
21 within the wide range of reasonable professional assistance.” *Creech v. Richardson*, 59 F.4th
22 372, 384 (9th Cir. 2023) (quotation omitted).

23

1 Alvarado's ineffective assistance claim is meritless and unsupported by the record. His
 2 lawyer advocated for a significant downward variance under § 3553. Counsel filed a thorough
 3 sentencing memorandum addressing § 3553 and requesting a 120-month sentence rather than the
 4 guideline recommendation of 235-293 months. ECF Nos. 213, 236 at 7. At the sentencing
 5 hearing, counsel discussed mitigating factors and asked that I "follow the recommendation as set
 6 forth in [the] memorandum." ECF No. 236 at 11-12. I varied significantly downward by
 7 imposing a sentence of 156 months. *Id.* at 18. There is no evidence that counsel performed
 8 deficiently by failing to argue for a downward departure.

9 Alvarado also asserts his eight-point criminal history calculation was erroneous because
 10 California reclassified a prior state marijuana conviction from a felony to a misdemeanor. *See*
 11 ECF No. 262 at 17-20. He argues that, as a misdemeanor, the conviction should count for one
 12 point rather than two. But even if the reclassification would have reduced his criminal history
 13 calculation by one point, there is no probability of a more favorable sentence. With a calculation
 14 of seven points, Alvarado would have remained in Criminal History Category IV. *See* U.S.S.G.
 15 Ch. 5, Pt. A (sentencing table). His ineffective assistance claim thus fails under this theory.²

16 Alvarado next contends that President Biden's pardon of United States citizens and
 17 lawful permanent residents convicted under federal law for simple possession of marijuana
 18 should reduce the points for his marijuana conviction to zero. *See* Proclamation No. 10467, 87
 19 Fed. Reg. 61,441 (Oct. 6, 2022). Alvarado appears ineligible for the pardon because he is not a
 20

21 ² In Ground 2, Alvarado argues the unlawful reentry statute, 8 U.S.C. § 1326, violates his
 22 constitutional rights. To the extent he argues counsel erred in failing to challenge the inclusion
 23 of his prior § 1326 conviction in his criminal history calculation, counsel's decision was not
 below an objective standard of reasonableness where nearly all courts have rejected the
 proposition that § 1326 violates the Constitution. *See United States v. Barcenas-Rumualdo*, 53
 F.4th 859, 865 & n.15 (5th Cir. 2022) (noting most courts agree § 1326 is constitutional).

1 United States citizen or lawful permanent resident, and his conviction was under state law. But
 2 even if the pardon applies to Alvarado, it was issued after his April 21, 2021 sentencing, so
 3 counsel did not perform deficiently in failing to raise it. *See* ECF No. 236.

4 Finally, Alvarado challenges his counsel's failure to raise "lack of discovery." ECF No.
 5 262 at 4. Alvarado does not elaborate on this allegation. If he refers to the alleged recordings of
 6 drug sale calls discussed in Ground 4, he does not explain how he was prejudiced by the failure
 7 to obtain those recordings. Alvarado vaguely states that the recordings prove his "[i]ntentions"
 8 and "qu[e]stion" the intentions of a confidential informant and the FBI. ECF No. 262 at 8. But
 9 he does not identify with any specificity the recordings' contents, why their production would
 10 have benefited his case, or how his counsel's performance fell below an objective standard of
 11 reasonableness by failing to obtain them. His vague and bare allegations are not sufficient to
 12 merit relief. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th Cir. 1989). Furthermore, when
 13 Alvarado pleaded guilty, he admitted there was a sufficient factual basis for his plea. ECF No.
 14 233 at 23-24, 26. Thus, I deny his motion as to Ground 1.

15 **B. Waiver of Grounds 2, 3, and 4**

16 Because the right to collaterally attack a conviction under § 2255 is statutory, a defendant
 17 can waive most grounds for attack if the waiver was knowing and voluntary. *United States v.*
 18 *Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993). The waiver in Alvarado's plea agreement thus
 19 bars Grounds 2, 3, and 4. But a waiver under § 2255 does not necessarily forfeit the right to
 20 challenge the waiver itself, such as by disputing that the waiver was knowing and voluntary. *Id.*
 21 Whether a waiver was knowing and voluntary depends on "what the defendant reasonably
 22 understood to be the terms of the agreement when he pleaded guilty." *United States v. Medina-*
 23 *Carrasco*, 815 F.3d 457, 461 (9th Cir. 2016) (quotation omitted). Alvarado does not address

1 waiver in his motion or argue that his waiver was not knowing and voluntary. But even if I
 2 construe his pro se motion to make that argument, there is no evidence supporting it. At his
 3 change of plea hearing, I advised Alvarado that by accepting the plea agreement, he was waiving
 4 all collateral challenges except those based on ineffective assistance of counsel. ECF No. 233 at
 5 20-21. He stated he understood he was waiving his collateral attack rights, that he fully
 6 understood the plea agreement, and that he entered the agreement knowingly and voluntarily. *Id.*
 7 at 21. I deny his motion as to Grounds 2, 3, and 4 because they are waived.³

8 Alvarado also challenges the First Step Act in his memorandum of law. That law does
 9 not appear related to his sentence. But even if it were, he waived any right to challenge it under
 10 § 2255.

11 C. Hearing

12 I must hold a hearing on a § 2255 motion “[u]nless the motion and the files and records
 13 of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b).
 14 “Mere conclusory allegations do not warrant an evidentiary hearing.” *Shah*, 878 F.2d at 1161.
 15 Most of Alvarado’s claims are indisputably barred by the waiver in his plea agreement. And his
 16 ineffective assistance of counsel claim is based on conclusory assertions unsupported by the
 17 record. Thus, no hearing on his motion is necessary.

18 D. Certificate of Appealability

19 Alvarado cannot appeal my ruling unless I issue a certificate of appealability. 28 U.S.C.
 20 § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1). To obtain that certificate, he “must make a substantial
 21 showing of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

22
 23 ³ The government also contends Grounds 2, 3, and 4 are procedurally defaulted because
 Alvarado did not raise them on direct appeal. I need not address this issue because the plea
 agreement bars those grounds.

1 This requires a “showing that reasonable jurists could debate whether (or, for that matter, agree
2 that) the petition should have been resolved in a different manner or that the issues presented
3 were adequate to deserve encouragement to proceed further.” *Id.* (quotation omitted). Where I
4 did not reach the merits of Alvarado’s motion on procedural grounds, he must show “that jurists
5 of reason would find it debatable whether the petition states a valid claim of the denial of a
6 constitutional right and that jurists of reason would find it debatable whether the district court
7 was correct in its procedural ruling.” *Id.* at 484.

8 I decline to issue a certificate of appealability. Because the record conclusively shows
9 counsel was not ineffective, no reasonable jurist would debate whether the petition should be
10 resolved in a different manner or whether the presented issues were adequate to proceed further.
11 Furthermore, because Alvarado knowingly, voluntarily, and unambiguously waived his collateral
12 attack rights except for ineffective assistance of counsel claims, no reasonable jurist would
13 debate whether his waiver bars Grounds 2, 3, and 4.

14 **CONCLUSION**

15 I THEREFORE ORDER that defendant Ever Antonio Alvarado-Coronado’s motion
16 under 28 U.S.C. § 2255 (**ECF No. 262**) is **DENIED**.

17 I FURTHER ORDER that Alvarado is denied a certificate of appealability.

18 I FURTHER ORDER the clerk of court to enter a separate civil judgment denying
19 Alvarado’s motion in the related civil case number 2:22-cv-02022-APG.

20 DATED this 5th day of April, 2023.

21 
22 ANDREW P. GORDON
23 UNITED STATES DISTRICT JUDGE